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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1284

BUB DAVIS PACKING CO., INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Appeal from the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE COURT:

INTRODUCTION

Petitioner sued Respondent under the Federal Tort Claim Act and appealed an adverse decision by the Trial Court, and now brings this Petition for relief for its wrongful affirmance by the Fifth Circuit.

PETITION (Rule 23 RSC)

a. The Trial Court's Opinion is in 443 F.Supp. 589 (WD Tx 1977), copy attached.

The Fifth Circuit's Opinion was Per Curiam (Goldberg, Ainsworth and Hill), and was dated 11/17/78,

and numbered 78-1236; it is reported in —— F(2) 1060.

b. The Jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

(i) The Trial Court's Memo Opinion was dated 11/23/77. Its Judgment was dated 12/6/77.

The Opinion of the Fifth Circuit was dated 11/17/78.

(ii) The Fifth Circuit denied rehearing in the matter on January 4, 1979.

(iii) 28 USC 1254(1).

c. Is the United States liable under the Federal Tort Claim Act where an agent of the United States Department of Agriculture and an employee of the United States (Department of Agriculture) deliberately and unlawfully introduced a dead cow (otherwise than by lawful slaughter) into Petitioner's meat plant, and then proceeded to close his plant down, causing him damage?

d. 5 USC 551, et seq. (Adm. Law Act.)

21 USC 601
21 USC 601 (m) (3,4,5)
21 USC 671
21 USC 672
21 USC 673
28 USC 1254(1)
28 USC 2401b
28 USC 2671
28 USC 2680
28 USC 2680a
28 USC 2680h

CFR (1977)

7 CFR 0.735-11
7 CFR 2.33
7 CFR 2610
7 CFR 2610.6
9 CFR 329.1
9 CFR 305.5

e. On June 6, 1975 (Government's Exh. No. 3; see Appendix concerning the "record" in this case), the United States Department of Agriculture (herein USDA) instituted an investigation relating to the bribery of one of their employees in Petitioner's meat packing plant.

(This probably was a spin-off of the matters referred to in *Columbia Packing Company v. USDA*, 563 F[2] 495, 1st Cir. 1977.)

To do this they instituted surveillance and having failed to find anything of a questionable nature, i.e. any violations, they put an undercover agent in Petitioner's meat plant.

Again the undercover agent couldn't find any violations, so with his supervisors, a disgruntled employee was hired; and between the USDA agent (Cotton) and the employee who was paid by the USDA (Augustine Flores), they found a dead cow (or killed one) and introduced it into the Petitioner's meat plant, unbeknownst to Petitioner or to any of his people.

Using this as a pretext, they closed the Petitioner's meat plant down on February 13, 1975, and he was cleared by the USDA men on the morning of February 14, 1975, and reopened.

The USDA, in the closing, seized certain beef which never proved to be the beef that had wrongfully been introduced into Petitioner's meat plant (and which eventually went into the chain of meat sales ending in human consumption). They did not seize *all* of the beef in Petitioner's meat plant.

This closing and seizure caused damage to Petitioner in the sum of $70,000+, for which he brought this suit in November of 1976.

f. N/A

g. The United States District Court for the Western District of Texas, San Antonio Division, had jurisdiction of this case by virtue of 28 USC 1346(b).

h. Concisely the opinion of the District Court and that part of it affirmed by the Fifth Circuit flys squarely in the face of *HATAHLEY*, 351 US 173 (1955); *JORDAN*, 294 FSupp 204 (SD Ga, 1968); *MOTORS INSURANCE*, 304 FSupp 973 (WD Mich, 1969); *PORTELLO*, 345 FSupp 1204 (DC, 1972); *DOWNS*, 522 F(2) 990 (6th, 1975); *MEYERS*, 527 F(2) 1252 (2nd, 1975); *CLEMENTE*, 422 FSupp 564 (Puerto R, 1976); and *SMITH*, 546 F(2) 872 (10th, 1976).

Further, the Fifth Circuit's opinion flys squarely in the face of such basic negligence law that it defies explanation; i.e. they held that when the agent of the USDA and the paid government employee put the cow into the Petitioner's meat plant (which they knew, or certainly should have known, was unlawful), *that they acted with due care*. "Due care" plays no role in that kind of tort.

This is an important Federal matter since it deals with U.S. agential extremeties. How far may an agency

of the government go to invade and cause damage to a private citizen and not be made accountable? The lower courts here have given such agencies untold license to invade private rights without any "minimal concern for" such rights (HATAHLEY, 351 US at p. 181). This is a question that this Court should not shunt to later days, but should answer it now.

i. There is appended hereto:

443 FSupp 589, and
——— F(2) 1060.

The judgment of the Court in SA 75 CA 56 is not appended since it was an agreed dismissal by the U.S. District Court for the Western District of Texas, San Antonio Division. SA 76 CA 56 was the confiscatory suit filed by the U.S.A. upon the closure of the Petitioner's meat plant, and the seizure of a side of unidentifiable beef.

j. N/A.

PRAYER

Petitioner prays the grant of a writ of certiorari and the reversal of the Fifth Circuit and the Trial Court, and the rendering of this matter by this Court. All that is needed is before it without serious dispute. The only real question is a $26.00+ differential as to damages, which this Court could handle under the "de minimus non curat lez" doctrine.

RELIEF IS RESPECTFULLY PRAYED.

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APPENDIX

APPENDIX A

Record

The record in this case consists of the following:

a. Vol. I consisting of the docket in the case, and all of the pleadings, briefs,[1] etc., but not containing the proposed pre-trial orders.

Called PAPERS

b. Vol. II transcript of proceedings containing the Q and A of three days of testimony.

Called SF

c. Vol. II Exhibits—Government's and Plaintiff's.

Called by Exhibit Number.[2]

d. 1st Suppl. Vol.—containing the same docket sheet as in Vol. I, and also the Plaintiff's proposed pre-trial order and the Government's pre-trial order (inversely).

Called PT

e. Depositional statement of Carl Glover (SA 75 CA 56).

Called GLOVER

f. Deposition of Frank W. "Bub" Davis II (SA 75 CA 56).

Called DAVIS

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[1] Plaintiff filed a "book" in connection with his Trial Brief; but Petitioner has been unable to determine whether or not this "book" was forwarded to the Fifth Circuit, or retained by the Western District of Texas or the Trial Judge. It is an integral part of Petitioner's Trial Brief and if not in the record, a copy thereof can be furnished.

[2] Plaintiff-Appellant had two groups of Exhibits Nos. 1 through 7; one group relating to Damages, see SF 11 through 24. These Exhibits are set out in item c. above.

g. Deposition of R. Kenneth Jordan (SA 75 CA 56).
Called JORDAN

h. Deposition of Matias Ramos (SA 75 CA 56).
Called RAMOS

i. Deposition of Augustine Flores (SA 75 CA 56).
Called FLORES

j. Deposition of Floyd Eugene Cotton (SA 75 CA 56).
Called COTTON

k. A loose batch of Plaintiff's Exhibits No. 1 through 30 (in a file folder identified as "depositions in related case SA 75 CA 56").

Called by Exhibit Number ———.

l. The record in SA 75 CA 56.
Called RECORD SA 75 CA 56.

m. Appellant's Brief in the Fifth Circuit.

n. Appellee's Brief in the Fifth Circuit.

o. Appellant's Petition for Rehearing in the Fifth Circuit.

(I have been unable to locate the entire file—items a through l. should be with the District Clerk of the Western District of Texas in San Antonio, where notice of this action shall be given pursuant to Rule 21; further items m through n are probably in the office of the Clerk of the Fifth Circuit in New Orleans, to which notice shall likewise be given.)

APPENDIX B

Title 21 USC

§ 601. Definitions

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(m) The term "adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

(5) if it is, in whole or in part, the product of an animal which has died otherwise than by slaughter;

Title 21 USC

§ 672. Administrative detention: duration: pending judicial proceedings: notification of governmental authorities: release

Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to subchapter I or II of this chapter, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been

inspected, in violation of the provisions of subchapter I of this chapter or of any other Federal law or the laws of any State or Territory, or the District of Columbia, or that such article or animal has been or is intended to be, distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed twenty days, pending action under section 673 of this title or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal, and shall not be moved by any person, firm, or corporation from the place at which it is located when so detained, until released by such representative. All official marks may be required by such representative to be removed from such article or animal before it is released unless it appears to the satisfaction of the Secretary that the article or animal is eligible to retain such marks.

Mar. 4, 1907, c. 2907, Title IV, § 402, as added Dec. 15, 1967, Pub.L. 90-201, § 16, 81 Stat. 598.

Title 21 USC

§ 671. Inspection services: refusal or withdrawal: hearing: business unfitness based upon certain convictions: other provisions for withdrawal of services unaffected: responsible connection with business: finality of Secretary's actions: judicial review: record

The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or withdraw, inspection service under subchapter I of this chapter with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under subchapter I of this chapter because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any Federal or State court, of (1) any felony, or (2) more than one violation of any law, other

than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. This section shall not affect in any way other provisions of this chapter for withdrawal of inspection services under subchapter I of this chapter from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.

For the purpose of this section a person shall be deemed to be responsibly connected with the business if he was a partner, officer, director, holder, or owner of 10 per centum or more of its voting stock or employee in a managerial or executive capacity.

The determination and order of the Secretary with respect thereto under this section shall be final and conclusive unless the affected applicant for, or recipient of, inspection service files application for judicial review within thirty days after the effective date of such order in the appropriate court as provided in section 674 of this title. Judicial review of any such order shall be upon the record upon which the determination and order are based.

Mar. 4, 1907, c. 2907, Tite IV, § 401, as added Dec. 15, 1967, Pub.L. 90-201, § 16, 81 Stat. 597.

Title 21 USC

§ 673. Seizure and condemnation—Proceedings in rem: libel of information: jurisdiction: disposal by destruction or sale: proceeds into the Treasury: sales restrictions: bond: court costs and fees, storage, and other expenses against claimants: proceedings in admiralty: jury trial: United States as plaintiff

(a) Any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules or other equines, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine, that is being transported in commerce or otherwise subject to subchapter I or II of

this chapter, or is held for sale in the United States after such transportation, and that (1) is or has been prepared, sold, transported, or otherwise distributed or offered or received for distribution in violation of this chapter, or (2) is capable of use as human food and is adulterated or misbranded, or (3) in any other way is in violation of this chapter, shall be liable to be proceeded against and seized and condemned, at any time, on a libel of information in any United States district court or other proper court as provided in section 674 of this title within the jurisdiction of which the article or animal is found. If the article or animal is condemned it shall, after entry of the decree, be disposed of by destruction or sale as the court may direct and the proceeds, if sold, less the court costs and fees, and storage and other proper expenses, shall be paid into the Treasury of the United States, but the article or animal shall not be sold contrary to the provisions of this chapter, or the laws of the jurisdiction in which it is sold: *Provided*, That upon the execution and delivery of a good and sufficient bond conditioned that the article or animal shall not be sold or otherwise disposed of contrary to the provisions of this chapter, or the laws of the jurisdiction in which disposal is made, the court may direct that such article or animal be delivered to the owner thereof subject to such supervision by authorized representatives of the Secretary as is necessary to insure compliance with the applicable laws. When a decree of condemnation is entered against the article or animal and it is released under bond, or destroyed, court costs and fees, and storag and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or animal. The proceedings in such libel cases shall conform, as nearly as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any case, and all such proceedings shall be at the suit and in the name of the United States.

Condemnation or seizure under other provisions unaffected

(b) The provisions of this section shall in no way derogate from authority for condemnation or seizure conferred by other provisions of this chapter, or other laws.

Mar. 4, 1907, c. 2907, Title IV, § 403, as added Dec. 15, 1967, Pub.L. 90-201, § 16, 81 Stat. 598.

Title 28 USC

§ 1254. Courts of appeals: certiorari: appeal: certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

§ 2401. Time for commencing action against United States

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

As amended April 25, 1949, c. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub.L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89-506, § 7, 80 Stat. 307.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States,

but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

As amended May 24, 1949, c. 139, § 124, 63 Stat. 106; July 18, 1966, Pub.L. 89-506, § 8, 80 Stat. 307.

Title 28 USC

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the

date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

7 CFR

Subpart B—Conduct and Responsibilities of Employees

§ 0.735-11 Prohibited conduct—general.

(a) An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in or create the appearance of:

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a Government decision outside of official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

(b) Employees are specifically prohibited from:

(1) Engaging in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government;

(2) Betting or participating in any gambling activity, including the operation of a gambling device, conducting a lottery or pool, or selling or buying a number slip or ticket, while on Government-owned or leased property or while on duty for the Government;

(3) Consuming intoxicating beverages on Government-owned or leased property, or transporting such beverages

in Government-owned or leased vehicles, or using such beverages at any time or place to the extent that it adversely affects performance of official duties;

(4) Lending funds at usurious interest rates;

(5) Provoking or harassing other employees, or making unwarranted criticism or accusations against other employees;

(6) Monitoring or recording, or authorizing or permitting others under their administrative control to monitor or record, telephone conversations for the purpose of taking a verbatim transcript of all or part of the conversation, unless such monitoring or recording is agreed to in advance by all participants in the conversation;

(7) Utilizing a mechanical or electronic device to monitor or record non-telephone conversations, unless such monitoring or recording is agreed to in advance by all participants in the conversation;

(8) Soliciting, making collections, canvassing for the sale of any article, or distributing or posting literature, advertising matter, or any other graphic matter, in any space occupied by the Department, except as authorized in writing by the Director of Personnel;

(9) Soliciting money from, or selling tickets to, persons outside the Government for the benefit of any organization of the Department;

(10) Taking any action which might prejudice the Government's interest in a criminal or civil case;

(11) Giving aid or assistance, other than in the discharge of official duties, to any claimant in prosecuting any claim against the United States;

(12) Distributing through the Department's mail and messenger service, or otherwise distributing or posting, in any space occupied by the Department, any circulars flyers, announcements, pictures, or other graphic matter, etc., that:

(i) Directly or indirectly attack or adversely reflect on the integrity of any official, officer or employee of any branch of the Government; or

(ii) Directly or indirectly condemn or criticize the policies of any Government department or agency.

9 CFR

§ 305.5 Withdrawal of inspection; statement of policy.

(a) The Administrator is authorized to withdraw inspection from an official establishment where the sanitary conditions are such that its products are rendered adulterated, or for failure of the operator to destroy condemned products as required by the Act and the regulations in this subchapter. Inspection may be withdrawn in accordance with section 401 of the Act and the applicable rules of practice.

(b) The assignment of inspectors may be temporarily suspended, in whole or in part, by the Administrator to the extent it is determined necessary to avoid impairment of the effective conduct of the program when the operator of any official establishment or any subsidiary therein, acting within the scope of his office, employment, or agency, threatens to forcibly assault or forcibly assaults, intimidates, or interferes with any program employee in or on account of the performance of his official duties under the act, unless promptly upon the incident being brought by an authorized supervisor of the program employee to the attention of the operator of the establishment the operator (1) satisfactorily justifies the incident, (2) takes effective steps to prevent a recurrence, or (3) provides acceptable assurance that there will not be any recurrences. Such suspension shall remain in effect until one of such actions is taken by the operator: *Provided,* That upon request of the operator he shall be afforded an opportunity for an expedited hearing to show cause why the suspension should be terminated.

[38 FR 9794, Apr. 20, 1973]

§ 329.1 Article or livestock subject to administrative detention.

Any carcass, part of a carcass, meat or meat food product of livestock, or article exempted from the definition of meat food product, or any dead, dying, disabled, or diseased livestock is subject to detention for a period not to exceed 20 days when found by any authorized representative of the Secretary upon any premises where it is held for the purposes of, or during or after distribution in, commerce or it is otherwise subject to Title I or II of the Act, and there is reason to believe that:

(a) Any such article is adulterated or misbranded and is capable of use as human food; or

(b) Any such article has not been inspected, in violation of the provisions of Title I of the Act, any other Federal law, or the laws of any State or Territory, or the District of Columbia; or

(c) Any such article or livestock has been or is intended to be, distributed in violation of the provisions of Title I of the Act, any other Federal law, or the laws of any State or Territory, or the District of Columbia.

APPENDIX C

BUB DAVIS PACKING CO., INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Civ. No. SA-76-CA-362.

United State District Court, W. D. Texas, San Antonio Division.

Nov. 23, 1977.

In an action brought by a meat packing plant operator against the United States under the Tort Claims Act, the District Court, John H. Wood, Jr., J., after postponing ruling on motion to dismiss, held that: (1) the Government had the requisite regulatory and statutory authority for actions taken, including investigation, requesting suspenion of operations and seizing and detaining a carcass; (2) activities of the Government and its officials were neither wrongful nor negligent; (3) the Government and its employees exercised "due care" within an exception to applicability of the Tort Claims Act; and (4) the decisions made by the Department of Agriculture fell within the "discretion" contemplated by another exception to applicability of the Act.

Complaint dismissed with prejudice.

1. United States

In action against United States under Tort Claims Act, for damages for allegedly wrongfully closing down plaintiff's meat packing plant, evidence established that Government had reasonable basis or probable cause to believe that violations of Meat Inspection Act and applicable regulations were occurring, and thus Government had reasonable basis for initiating and conducting investigation of the plant. Federal Meat Inspection Act, §§ 1 et seq.,

4, 6, 407, 21 U.S.C.A. §§ 601 et seq., 604, 606, 677; Federal Trade Commission Act, §§ 6(a), 8-10, 15 U.S.C.A. §§ 46(a), 48-50; 28 U.S.C.A. §§ 1346(b), 2680.

2. Food

Under evidence, Government had requisite regulatory and statutory authority for actions taken on basis of information acquired, in sending undercover investigator into meat packing plant and subsequently requesting suspension of operations and seizing and detaining one carcass. Federal Meat Inspection Act, §§ 1 et seq., 4, 6, 407, 21 U.S.C.A. §§ 601 et seq., 604, 606, 677; Federal Trade Commission, Act, §§ 6(a), 8-10, 15 U.S.C.A. §§ 46(a), 48-50.

3. United States

Under evidence, activities of federal Government and its officials, for which there was requisite regulatory and statutory authority, in requesting suspension of operations of meat packing plant and in seizing and detaining one carcass were neither wrongful nor negligent, and gave rise to no claim under Tort Claims Act. 28 U.S.C.A §§ 1346(b), 2680(a); Federal Meat Inspection Act, §§ 1 et seq., 4, 6, 407, 21 U.S.C.A. §§ 601 et seq., 604, 606, 677; Federal Trade Commission Act, §§ 6(a), 8-10, 15 U.S.C.A. §§ 46(a), 48-50.

4. United States

Under evidence, federal Government and its employees exercised "due care" within exception of Tort Claims Act, in investigating operations in plaintiff's meat packing plant and in requesting suspension of operations and in seizing and detaining one carcass. 28 U.S.C.A. §§ 1346(b), 2680(a); Federal Meat Inspection Act, §§ 1 et seq., 4, 6, 407, 21 U.S.C.A. §§ 601 et seq., 604, 606, 677; Federal Trade Commission Act, §§ 6(a), 8-10, 15 U.S.C.A. §§ 46(a), 48-50.

5. United States

Duty of "due care" as used in exception to applicability of federal Tort Claims Act is addressed to proper implementation of statutes and regulations. 28 U.S.C.A. §§ 1346 (b), 2680, 2680(a).

6. United States

Decisions made by United States Department of Agriculture to investigate plaintiff's meat packing plant, in requesting suspension of operations and in seizing and detaining one carcass were within the "discretion" contemplated by exception to applicability of Tort Claims Act. Federal Meat Inspection Act, §§ 1 et seq., 604, 606, 677; Federal Trade Commission Act, §§ 6(a), 8-10, 15 U.S.C.A. §§ 46(a), 48-50; 28 U.S.C.A. §§ 1346(b), 2680, 2680(a).

J. P. Darrouzet, Austin, Tex., for plaintiff.

Jamie C. Boyd, U. S. Atty. by Harold O. Atkinson, Asst. U. S. Atty., San Antonio, Tex., for defendant.

MEMORANDUM OPINION

JOHN H. WOOD, Jr., District Judge.

I. BACKGROUND

This action was brought by Plaintiff, Bub Davis Packing Co., Inc., against the United States under the Tort Claims Act. The Complaint alleged that the United States Department of Agriculture wrongfully closed down Plaintiff's meat packing plant and sought damages. The action arose out of a criminal investigation conducted jointly by the United States Department of Agriculture's Office of Investigation and its Animal Plant Health and Inspection Service (A.P.H.I.S.). The Government answered, denying that the activities of the Government employees were

wrongful and asserting that all the events which transpired at Plaintiff's meat packing plant resulted from the valid exercise of the power of the Department of Agriculture to regulate the process by which meat is supplied to the public. In addition, the Government filed a Motion to Dismiss, urging that the "discretionary function" exception of the Tort Claims Act, 28 U.S.C. § 2680(a), was applicable to the facts of this cause. The Government also urged that it exercised "due care" as that term applies in Section 2680(a).

As to the merits, the Government urged that the conduct of its employees was neither wrongful nor negligent, and that such acts were not the proximate cause of Plaintiff's alleged injury, and that no damages were sustained by Plaintiff.

The Court received into evidence the depositions and statements of various witnesses and also heard live testimony. The Court postponed ruling on the Government's Motion to Dismiss and proceeded to hear the cause on the merits. Accordingly, the Court has carefully reviewed and considered all the evidence submitted by the parties in order to make an independent determination of the merits of this action, and to consider the jurisdictional issues raised. Consideration, first, is given to the tort liability aspects of this action.

II. THE TORT CLAIM

On February 13, 1975, Floyd E. Cotton an Investigator of the Department of Agriculture's Office of Investigation, was acting in an undercover capacity at Plaintiff's meat packing plant. Because of prior reports received by the Department of Agriculture that adulterated meat, derived from dead, dying, or diseased cattle, was being processed at the Davis plant, agent Cotton was assigned to observe the plant's operation. During this time Cotton winessed

a dead, or lifeless, cow being taken into the plant for processing.

Later that day, an employee of Bub Davis Packing Company, Augustine A. Flores, who also served as an informant for the Government, identified another animal as having died other than by slaughter. Both animals were taken into the plant by employees of the packing company for processing and shipping to the public. Based on the observations of agent Cotton, the federal inspectors assigned to the plant by A.P.H.I.S. requested that plant operations by suspended pending a determination of what had happened to the adulterated beef. Subsequently, one carcass was seized and detained, and became the subject of *United States v. One Beef Carcass,* Cause No. SA-75-CA-56, which suit was dismissed by the Court, after settlement, on April 6, 1976.

On December 18, 1975, Plaintiff filed an administrative claim against the Department of Agriculture under the Tort Claims Act. By letter dated June 9, 1976, the Department of Agriculture denied said administrative claim. Following the denial of Plaintiff's claim by the Department of Agriculture, this suit was instituted.

The Court finds that the Department of Agriculture initiated an investigation regarding Plaintiff's activities to determine whether dead, "downed" or dying animals were being processed into food for human consumption in violation of the Meat Inspection Act, 21 U.S.C. § 601 *et seq.* and to investigate possible bribery by Plaintiff of a Department of Agriculture inspector assigned to Plaintiff's meat processing plant.

The testimony of Rene Campos, Officer-in-Charge, Southwest Area of A.P.H.I.S., the testimony of Dr. W. H. Irvin, Regional Director, Southwest Region of A.P.H.I.S. and of William D. Parker, Regional Director, Region V, of the Office of Investigation of the Department of Agriculture, together with the exhibits introduced by them, established

clearly to the Court that an investigation of the activites of Plaintiff's meat packing plant was initiated and conducted only after officials from A.P.H.I.S. and the Office of Investigation had considered the nature and source of the charges and had determined that the allegations were of such a serious nature as to warrant an extensive investigation. Their testimony and that of other Government witnesses further indicates that the Government took certain precautions to be certain the allegations were true. These precautions included an extensive "round-the-clock" surveillance of Plaintiff's plant for more than a week, involving Government employees from both A.P.H.I.S. and the Office of Investigation, and included daily briefings of Augustine Flores. Flores had agreed to serve as an informant for the Government after he told the Government investigators of his observations of dead or "downed" cattle being processed by the plant without prior Government inspection.

The surveillance was undertaken from a residence near the plant where the activities in the pen area of the plant could be observed. In fact, the Government employees testified to observing several apparent violations of the Meat Inspection Act.[1] It appears to the Court that the Government certainly had a reasonable basis for initiating and conducting its investigation of Plaintiff's plant.

[1] The foregoing demonstrates, and the Court finds, that the Government had a reasonable basis or probable cause to believe that violations of the Meat Inspection Act and the applicable regulations were occurring. A long line of cases, from *Stacey v. Emery*, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878) to *United States v. Tuley*, 546 F.2d 1264, 1267 (5th Cir. 1977), state the classic definition of "probable cause." These cases say that probable cause exists if "the

[1] A summary of the testimony of the Government employees concerning such violations is attached hereto as Appendix A.

facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been [or is being] committed . . . ." It appears to the Court that the Government has more than adequately met this standard.

[2] The evidence further shows that following the Government's continuing surveillance and its interviews with informant Flores, A.P.H.I.S. and Office of Investigation officials decided to send agent Cotton to the plant in an undercover capacity so that he could more closely observe the activities of the plant. While Cotton was at the plant, he and Flores observed two cows which had died other than by slaughter being taken into the plant. Under the facts of this case, the Government had the requisite regulatory and statutory authority for the actions taken. For example, 21 U.S.C. § 604 provides in part as follows:

> . . . and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, . . .

In addition, 9 C.F.R. 305.5(a) provides as follows:

> The Administrator is authorized to withdraw inspection from an official establishment where the sanitary conditions are such that its products are rendered adulterated, or for failure of the operator to destroy condemned products as required by the Act and the regulations in this subchapter. Inspection may be withdrawn in accordance with Section 401 of the Act and the applicable rules of practice.

It appears to the Court that the introduction of a cow which is dead, "downed," or dying into a plant which processes animals for human consumption is a violation of the sanitary conditions of a meat packing plant. In addi-

tion, the failure to destroy condemned products is contemplated by 9 C.F.R. 305.5(a).

Furthermore, 21 U.S.C. § 677 provides that the Secretary of Agriculture, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under Chapter 12 of Title 21 of the United States Code. It further provides he shall also have the powers conferred usder Sections 46(a) and (b), 48, 49, and 50 of Title 15. Said Section 46(a) provides as follows:

> The Commission shall also have power—
>
> > Investigation of persons, partnerships, or corporations
> >
> > (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, . . . to regulate commerce, and its relation to other persons, partnerships, and corporations.

And, Section 49 provides the Secretary shall, at all reasonable times, have access to the documentary evidence of any corporation and the power to require by subpoena the attendance and testimony of witnesses. Finally, a portion of 21 U.S.C. § 606 bears emphasis regarding the inspection powers of the Secretary of Agriculture:

> For the purposes hereinbefore set forth, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the

> establishment be operated or not, to every part of said establishment;
>
> . . . . .

[3] The Court finds, after considering all the evidence, that the activities of the Government and its officials were neither wrongful nor negligent. In addition, the Court finds that Plaintiff did not prove the Government's acts were the proximate cause of Plaintiff's alleged damaged. While there was testimony by Plaintiff relating to damages, the Court believes a finding as to damages is not necessary to the decision of the merits of this cause. Therefore, the Court enters judgment that Plaintiff take nothing.

III. JURISDICTIONAL ISSUES

A. The "Due Care" Provision of 28 U.S.C. § 2680(a).

Plaintiff's claim is barred by the first portion of 28 U.S.C. § 2680(a) which provides that the Tort Claims Act shall not apply to:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising *due care,* in the execution of a statute or regulation . . . . (Emphasis supplied.)

[4, 5] The evidence is clear that the Government and its employees exercised "due care" in carrying out the applicable statutes and regulations. The duty of "due care" is addressed to the proper implementation of the statutes and regulations. "Due care" is defined in *Hatahley v. United States,* 351 U.S. 173, 181, 76 S.Ct. 745, 752, 100 L.Ed. 1065 (1956). In *Hatahley,* the Supreme Court said:

> 'Due care' implies at least some minimal concern for the rights of others. Here, the agents proceeded with complete disregard for the property rights of the petitioners.

The evidence in the instant cause is clear that the Government and its employees acted with a much higher standard than that afforded by a "minimal concern for the rights of others," or "complete disregard for the property rights" of the Plaintiff.

The Court finds that the acts which the Plaintiff complains were wrongful and illegal were not taken solely on the basis of an informant's tip. To the contrary, when Plaintiff's employee, Augustine A. Flores, informed A.P.H.I.S. Compliance Officer Matias Ramos of possible violations of the Meat Inspection Act at Plaintiff's plant, the Government, acting through Department of Agriculture officials in A.P.H.I.S. and the Office of Investigation, made a series of policy decisions relating to enforcement of the Act which resulted in the initiation of an investigation to determine the truth or falsity of Flores' allegations.

Therefore, under the facts presented in the instant case, it appears to the Court that it does not have jurisdiction over the United States because the Government did exercise "due care" as contemplated by Section 2680(a).

B. The "Discretionary Function" Exception of 28 U.S.C. § 2680(a).

The next jurisdictional consideration is whether the "discretionary function" exception of 28 U.S.C. § 2680(a)[2] is applicable.

---

[2] § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due case, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.* (Emphasis supplied.)

This Court has carefully reviewed the history of the discretionary function exception of the Tort Claims Act, particularly the decisions of the Fifth Circuit Court of Appeals. It appears that such a review must begin with *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), which originated within the Fifth Circuit. *Dalehite,* at pages 24-30, 73 S.Ct. 956, indicates that from the legislative history of the Tort Claims Act Section 2680(a) was intended to protect the Government against tort liability for errors in administration or in the exercise of a discretionary function. It further indicates (at 30-36, 73 S.Ct. 956) that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

However, subsequent decisions of the Supreme Court and this Circuit modified the general principles expressed by *Dalehite. See, Rayonier, Inc. v. United States,* 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Pigott v. United States,* 451 F.2d 574 (5th Cir. 1971); *Moyer v. Martin Marietta Corp.,* 481 F.2d 585 (5th Cir. 1973); and *J. H. Rutter Rex Manufacturing Co., Inc. v. United States,* 515 F.2d 97 (5th Cir. 1975).

It would appear, however, that the facts in the instant cause are analogous to those in *Smith v. United States,* 375 F.2d 243 (5th Cir. 1967), *cert. denied,* 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967). The *Smith* case was a tort suit against the United States brought by a proprietor of a business claiming that the Federal Bureau of Investigation failed to fully investigate and prosecute an alleged boycott of the proprietor's store. The proprietor had been a federal juror in a civil rights case, and had urged that the boycott destroyed his business. The Government invoked the discretionary function exception.

The opinion in *Smith* provides an excellent discussion of Section 2680(a), including language from *Rayonier, supra,*

and *Indian Towing Co., supra.* Some of the language limiting the application of Section 2680(a) is worth noting, particularly where the court states, at page 246,

> [1] If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite,* and that interpretation is rejected by *Indian Towing* and especially by *Rayonier.* . . .

The Circuit, in *Smith,* while declining to apply an absolutist interpretation to the facts of its case, nevertheless held that the decision whether to investigate or prosecute involved the type of discretion to which Section 2680(a) was applicable.

[6] In the instant cause the Court believes that the *Smith* principles are applicable. The decision by the Department of Agriculture to investigate Plaintiff's meat packing plant is clearly the kind of "discretion" contemplated by Section 2680(a).

The evidence received at the trial established that the enforcement actions taken in this case were the result of decisions made on the regional and national levels of the Department of Agriculture. The Court believes that such decision-making was within the scope of Section 2680(a).

A decision from another district, that of *Portello and Co. v. Butz,* 345 F.Supp. 1204, 1207 (D.D.C.1972) is persuasive. In applying the discretionary function exception, the court, in *Portello* stated:

> [1] The regulations vest considerable discretion in the official inspectors in their determinations as to the adulteration or misbranding of meat both in domestic establishments and at ports of entry. That discretion is consonant with the policy of the Act, as stated in 21 U.S.C. § 602 (1970). It is clear from that section that the policy of the Act and the regulations is above all to protect the health and welfare of consumers.

The Court, therefore, finds that the discretionary function exception of the Tort Claims Act is applicable in this cause, and that the sovereign immunity of the United States has not been waived.

It is therefore ORDERED that Plaintiff's Complaint be dismissed, with prejudice.

APPENDIX A

SUMMARY OF GOVERNMENT EMPLOYEES' TESTIMONY REGARDING THEIR SURVEILLANCE OF THE BUB DAVIS PACKING CO., INC.

(a) According to the testimony of Robert Howard and Charlie Rawle, on February 10, 1975, Howard observed two apparently lifeless cows being hoisted from the pens (not from a truck) toward the plant—an apparent violation of 21 U.S.C. §§ 603 and 605 as well as 9 C.F.R. 309.3(a), (b), 309.13(a), or 9 C.F.R. 309.2(b) and 390.15(a).

(b) On February 11, 1975, Howard observed an apparently lifeless cow being hoisted from the pens into the plant an apparent violation of 21 U.S.C. §§ 603 and 605 as well as 9 C.F.R. 309.3(a), (b), 309.13(a), or 9 C.F.R. 309.2(b) and 390.15(a).

(c) On February 12, 1975, Howard observed two apparently lifeless cows being hosited into the plant. An apparent violation of 21 U.S.C. §§ 603 and 605 as well as 9 C.F.R. 309.3(a), (b), 309.13(a), or 9 C.F.R. 309.2(b) and 390.15(a). Howard testified conclusively that these cows were dead in the pens and that they were taken into the plant by the same route used for the normal kill.

(d) On February 11, 1975, Ramos observed an apparently lifeless calf hoisted out of a truck and sent off on an overhead rail toward the plant an apparent violation of 21

U.S.C. §§ 603 and 605 as well as 9 C.F.R. 309.3(a), (b), 309.13(a), or 9 C.F.R. 309.2(b) and 309.15(a).

(e) Agent Cotton, on February 13, 1975, witnessed a lifeless black cow being taken from the chute area into the plant, processed through the edible food compartment of the plant along with other carcasses apparently intended for placement into commerce for purposes of human consumption. The carcass of this cow was subsequently located and identified by plant foreman Glover and by identifying stab wounds in the shoulders (testimony of Ramos and Cotton) on the afternoon of February 13, 1975. This carcass was in the cooler with the rest of the day's kill and did not bear the "condemned" stamp. This would involve violations of 21 U.S.C. §§ 603, 604, 605, and 606, and 9 C.F.R. 309.3(a) and (b), 309.13(a), 314.3(a), 314.8(a) and (b).

(f) The Government's surveillance logs indicate that Cotton observed, on February 12, 1975, two downed cows (a grayish-brown cow with tag no. 228 and a hereford cow with tag no. 533) and a dead hereford cow, with no visible tag, in the pens.

The statement of informant Augustine A. Flores, dated February 12, 1975, indicates that on February 12, 1975, (1) Flores observed two red cows bearing tag numbers 533 and 695 which he believed to be dead, (2) Flores observed a grayish jersey cow bearing tag number 228 downed in the pens, (3) Flores observed three other downed hereford cows and one dead hereford cow, and (4) all of these animals were observed by Flores to be processed for human consumption—involving violations of 21 U.S.C. §§ 603, 604, 605 and 606, and 9 C.F.R. 309.2(b), 309.3(a) and (b), 309.13 (a), 314.3(a), 314.8(a) and (b).

(g) A subsequent statement by Augustine A. Flores, of February 13, 1975, indicates that Flores, on February 13, 1975, observed two dead cows taken from the pen area into the plant and processed for human consumption. One of these cows was black and bore tag number 730, and is the

same cow observed by Agent Cotton and the carcass of which was later detained. The other cow was a blackish-gray brahman cow bearing tag number 609. Flores further stated he did not "knock" or "stun" the animals since they were already dead. ("Knocking" or "stunning" of animals is a method of rendering such animals unconscious prior to their being processed)

(h) The testimony of Howard and Rawle indicates they recovered two cow skulls from an offal truck containing the animals processed that day which did not have any evidence of having been knocked or stunned. All other skulls they examined did have such knocking marks or fractures.

(i) Government agents interviewed employees of Bub Davis Packing Co., Inc., on February 13, 1975, and February 14, 1975, regarding their knowledge of possible violations of the Meat Inspection Act at the plant. These statements, which were received in evidence, indicate that dead or dying animals were processed routinely at Plaintiff's plant, in violation of the Act.

BUB DAVIS PACKING CO., INC.,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 78-1236

Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Nov. 17, 1978.

Appeal from the United States District Court for the Western District of Texas; John H. Wood, Jr., Judge.

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM:

Agents of the United States Department of Agriculture seized certain meat from the plant of Appellant, Bub Davis Packing Company, Inc., and the plant was forced to close for a period of approximately twenty four hours when the Government inspectors were withdrawn. Appellant brought suit under the Federal Tort Claims Act. 28 U.S.C.A. §§ 2671-2680. The suit was tried before the District Court, without a jury, and, after considering all the evidence and arguments of the parties, the District Court entered a judgment based upon a detailed Memorandum Opinion. *Bub Davis Packing Co., Inc. v. United States,* 443 F.Supp. 589 (W.D.Tex.1977).

After careful consideration of the record on appeal and the parties' arguments, we affirm the judgment appealed from. Since the District Court's holding regarding the "Due

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.,* 5 Cir. 1970, 431 F.2d 409, Part I.

Care" provision of 28 U.S.C.A. § 2680(a) provides a sufficient basis for the resolution of the jurisdictional issues, we affirm that issue solely on that basis. *Id.* at 593, Part III.A. We expressly do not reach the alternative jurisdictional issue under the "Discretional Function" exception of 28 U.S.C.A. § 2680(a). *Id.* at 593-95, Part III.B.

AFFIRMED.

Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

No. 78-1284

In the Supreme Court of the United States

OCTOBER TERM, 1978

BUB DAVIS PACKING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1284

BUB DAVIS PACKING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. Petitioner brought this action in the United States District Court for the Western District of Texas under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.* Petitioner sought damages for the allegedly wrongful closing of its meat packing plant by the United States Department of Agriculture. The United States moved to dismiss the complaint, urging that the "due care" and "discretionary function" exceptions to the Tort Claims Act (28 U.S.C. 2680(a), see Pet. App. 8a) precluded recovery.

After a trial on the merits, the district court granted the government's motion (Pet. App. 25a). It found (Pet. App. 16a-18a) that on February 13, 1975, Floyd Cotton, an agent from the Department of Agriculture's Office of Investigation, entered petitioner's plant in an undercover capacity following reports to the Department that the plant was processing adulterated meat from dead or dying

cattle for human consumption. While inside, Cotton saw a dead cow being taken into the plant for processing. Petitioner's employee Augustine Flores, an informant for the government, identified another dead cow that had been brought into the plant that same day. Based on these observations, government inspectors entered petitioner's plant and requested that plant operations cease pending a determination of what had happened to the dead cows. One carcass was seized and detained.

The district court ruled (Pet. App. 17a) that the investigation had been undertaken to determine whether adulterated beef was being processed for human consumption in violation of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*). The court found that the Department of Agriculture had a reasonable basis for initiating this investigation (Pet. App. 18a) and had authority to do so (*id.* at 19a). The court also found that the federal agents had acted neither wrongfully nor negligently, and it entered judgment for the government (Pet. App. 21a). Moreover, the court found that it lacked jurisdiction because the government's agents acted with due care and in pursuit of a discretionary function (see 28 U.S.C. 2680(a)). It therefore dismissed the complaint (Pet. App. 25a).

The court of appeals affirmed (Pet. App. 28a-29a). Its affirmance was based on the district court's finding of due care. It did not reach the discretionary function issue.

2. The decision of the court of appeals is correct, and petitioner presents no issue warranting review. Petitioner's only apparent contention (see Pet. 2, 3) is that the United States should be liable if its agent "deliberately and unlawfully introduced a dead cow" into petitioner's plant

(Pet. 2). Petitioner points to nothing in the record to support this implication of misconduct, and the findings of the lower courts refute it.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

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[1]Petitioner relies on *Clemente* v. *United States*, 422 F. Supp. 564 (D. P.R. 1976). That decision, however, was reversed by the court of appeals. 567 F. 2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). In *Myers & Myers, Inc.* v. *USPS*, 527 F. 2d 1252 (2d Cir. 1975), the court held that the due care exception did not apply because the Postal Service had violated its own procedural regulations. *Portello & Co.* v. *Butz*, 345 F. Supp 1204 (D. D.C. 1972), held that federal regulations concerning meat processing did involve the exercise of discretion on the part of federal employees. *Smith* v. *United States*, 546 F. 2d 872 (10th Cir. 1976), is inapposite; there the United States, as a landowner, failed to post warning signs regarding hidden dangerous conditions. In *Downs* v. *United States*, 522 F. 2d 990 (6th Cir. 1975), FBI agents negligently carried out a previously promulgated hijacking policy, which resulted in several deaths. None of these cases supports petitioner.

No. 78-1284

Supreme Court, U. S.
FILED
APR 21 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1978

BUB DAVIS PACKING CO., INC., PETITIONER

VS

UNITED STATES OF AMERICA, RESPONDENT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY MEMORANDUM FOR PETITIONER

J. P. DARROUZET
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Suite No. G 10
812 San Antonio
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512 477 4210

ATTORNEY FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1284

BUB DAVIS PACKING CO., INC., PETITIONER

VS

UNITED STATES OF AMERICA, RESPONDENT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY MEMORANDUM FOR PETITIONER

TO THE HONORABLE COURT:

The Solicitor General says:

> (The Trial Court) ". . . found . . . that . . . Cotton, an agent from the Department . . . entered Petitioner's plant in an undercover capacity . . . While inside, Cotton saw a dead cow being taken into the plant for processing."

Cotton also testified (see P. 11 et seq., COTTON'S deposition—cf., Petitioner's Brief, Appendix 2a, Item j.) that he had no knowledge of how to tell whether beef was injured, harmed, alive or dead.

Further, the Solicitor General says:

> (That Flores) ". . . an informant for the government identified another dead cow that had been brought into the plant that same day."

And,

> "Based on these observations, government inspectors . . . requested that plant operations cease . . ."

First off, Flores wasn't just an "informant"; he was a governmental employee under the Federal Tort Claim Act, and both COTTON and FLORES testified that they had found the dead cow (which Cotton and Flores said they saw being taken into Petitioner's plant) and introduced it into the Petitioner's plant. See SF 191-195; see also COTTON'S deposition p. 61 and 105; and FLORES' deposition, p. 47.

And you may search the record from top to toe and find no place where the government inspector "requested" the closure of the plant. It was done by withdrawal of inspection pursuant to 21 USC 671 and 9 CFR 305.5.

The Solicitor General's position, unfortunately, is that taken all along by the Government in this case—namely, that someone else did something or that the Petitioner acquiesced in what happened—*neither of which positions is true.*

COTTON and FLORES, who was clearly a governmental employee under the Federal Tort Claim Act, found or killed a downed cow and introduced it into Petitioner's plant for the purpose of processing the same for human consumption; and it was upon this ruse that inspection was withdrawn and Petitioner's plant closed—AND UPON NO OTHER REASON!

Misrepresentations by the Government should not be permitted to defeat liability of the U.S.A. for the deliberate wrongful acts of the USDA agents and their employees.

The Solicitor General says that Petitioner:

> ". . . points to nothing in the record to support (the) implication of misconduct . . ."

This is not true as the above will attest, as well as the trial briefs filed herein, and the brief filed with the Fifth Circuit.* Rather than use this ad hominum argument, he should confess the error of the USDA agents and their employee (FLORES) and request with us that Petitioner be made whole due to the harm done by such agents without even a minimum regard for the rights or for the property of others.

And in this regard, it should be further noted that the Trial Court, the Fifth Circuit, the United States Attorney, and the Solicitor General have nothing to say about the *HATAHLEY* case, 351 US 173 (1955), which is dispositive of this matter.

Accordingly, the prayer of the Application is renewed.

RESPECTFULLY SUBMITTED,

April 1979

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512 477 4210

ATTORNEY FOR PETITIONER

* Apparently the Solicitor General would have this Court hold that since the lower courts' "found" such things as he misrepresents in his MEMORANDUM, then no error obtains. Such a view is "gamesmanship" at its worst; see CONLEY 355 US 41; HOUGHAM 364 US 310; FOMAN 371 US 178; ZENITH RADIO 401 US 321; MAYOR OF PHILADELPHIA 415 US 605; PROCTER & GAMBLE 356 US 677 and HICKMAN 329 US 495. Cf. - in criminal law - WILLIAMS 399 US 78 and Brennan: THE CRIMINAL PROSECUTION: SPORTING EVENT OR QUEST FOR TRUTH? 1963 Wash. U. L. Q. 279.